STATE OF MICHIGAN

IN THE SUPREME COURT

BEVERLY HEIKKILA, Personal Representative
for the Estate of Sheri L. Williams,

Plaintiff-Appellee,

v

NORTH STAR TRUCKING, INC.,

Defendant,

and

MARC ROLLAND SEVIGNY and
J.R. PHILLIPS TRUCKING LTD.,

Defendants-Appellees,

and

NORTH STAR STEEL CO,

Defendant/Cross-Plaintiff-Appellant,

v

INTERNATIONAL MILL SERVICE, INC.,

Defendant/Cross-Defendant-Appellee.

127780, 127823

Supreme Court Nos. ~~127790~~, ~~127824~~, 127836

Court of Appeals No. 246761

Monroe Circuit No. 00-11135-NI

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GEOFFREY N. FIEGER (P30441)
ARNOLD J. MATUSZ (P33203)
TAMMY J. REISS (P41851)
FIEGER, FIEGER, KENNEY & JOHNSON PC
Attorneys for Plaintiffs
19390 W. Ten Mile Road
Southfield, MI 48075
(248) 355-5555

STUART H. TEGER (P31674)
HONIGMAN, MILLER SCHWARTZ & COHN
Attorney for North Star Steel
660 Woodward Avenue, Suite 2290
Detroit, MI 48226
(313) 465-7576

ROBERT G. KAMENEC (P35283)
PLUNKETT & COONEY, PC
Attorney for International Mill Service, Inc.
38505 N. Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4068

ROSALIND ROCHKIND (P23504)
GARAN LUCOW MILLER, PC
Attorney for JR Phillips Trucking Ltd.
and Marc Rolland Sevigny
1000 Woodbridge Street
Detroit, MI 48207-3192
(313) 446-5522

/

PLAINTIFF-APPELLEE'S RESPONSE
BRIEF IN OPPOSITION TO DEFENDANTS' APPLICATIONS
FOR LEAVE OR OTHER PEREMPTORY ACTION

EXHIBITS

PROOF OF SERVICE

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Counterstatement Of The Questions Presented

I. Did Plaintiff Plead And By Way Of Affidavits, Depositions And Documentary Evidence, Set Forth Facts From Which A Jury Could Conclude That Sevigny/JRP Had A Legally Cognizable Duty To Check The Truck Wheels And Tires For Slag And That IMS Had A Legally Cognizable Duty To Scour The Roadways On The NSS Premises For Foreseeably Dangerous Pieces Of Slag?

Plaintiff-Appellee says "Yes."

The Court of Appeals said "Yes."

The Trial Court said "No."

Defendants-Appellants say "No."

II. Did Plaintiff Submit Sufficient Circumstantial Evidence To Exclude Other Explanations And To Permit A Jury To Determine Whether Sheri Williams' Death Was More Likely Than Not Caused By An Errant Piece Of Slag From The NSS/IMS Premises Which Wedged Between The Sevigny/JRP Truck Tires And Then Was Propelled Through Her Windshield Killing Her?

Plaintiff-Appellee says "Yes."

The Court of Appeals said "Yes."

The Trial Court said "No."

Defendants-Appellants say "No."

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Counterstatement Regarding Order Appealed From And Relief Sought

Defendants North Star Steel Company ("NSS"), Mark Sevigny and J.R. Phillips Trucking, Ltd. ("Sevigny" and "JRP"), and International Mill Service, Inc. ("IMS") filed separate Applications for Leave to Appeal December 7, 2004 from the Court of Appeals unpublished per curiam opinion which reversed Monroe Circuit Judge William LaVoy's November 20, 2002 decision granting summary disposition on motions by NSS and Sevigny/JRP in this wrongful death/negligence case. On December 2, 2002, despite having previously denied summary disposition to IMS, Judge LaVoy also dismissed that Defendant, and on January 29, 2003, a final order dismissing all Defendants was entered. The suit arose from the horrific October 13, 1999 death of Sheri Williams who was killed when an object crashed through her windshield and struck her in the head as she drove Eastbound on East Front Street in Monroe and passed a Westbound JRP truck driven by Sevigny hauling slag or scrap metal from the NSS premises.

The Court of Appeals panel (Smolenski, P.J. and White and Kelly) reversed in a split opinion. Judge Smolenski's lead opinion which Judge White joined in except with respect to the affirmance of the exclusion of two of Plaintiff's experts, an argument not at issue before this Court, found "that plaintiff has set forth sufficient evidence to suggest that, more likely than not, the object probably was thrown from the truck, as opposed to falling off the truck, or falling from the sky, or coming from anywhere else" (Exhibit A: Smolenski Opinion, p 3). Judge Smolenski added that, based on the evidence, "the only legitimate explanation appears to be that the object was hurled by Sevigny's tires towards Williams' car" (Exhibit A: Smolenski Opinion, p 3). The majority also found that

"plaintiff has satisfied her burden of showing that the object was more likely than not a piece of slag from North Star's facility" that had wedged between Sevigny's trailer tires (Exhibit A: Smolenski Opinion, pp 3-4). Thus, with respect to proximate cause, the opinion concluded that "plaintiff has satisfied the evidentiary threshold" and "presented sufficient evidence to indicate a 'reasonable likelihood of probability' that defendants' actions served as the proximate cause of Williams' death" (Exhibit A: Smolenski Opinion, p 4).

With respect to duty and the specific issue of foreseeability, the majority found that was a factual "question as to the conditions of the road, and whether Sevigny satisfied any duty by inspecting his tires." Accordingly, the opinion held that duty was an issue of fact for the jury (Exhibit A: Smolenski Opinion, p 6).

Judge Kirsten Frank Kelly's dissenting opinion acknowledged sufficient causation evidence with respect to Sevigny/JRP, but she would have affirmed as to NSS and IMS on causation because "plaintiff failed to establish a link between decedent's death and any action on the[ir] part ..." (Exhibit A: Kelly dissent, pp 2, 4). Because the object that killed Ms. Williams was never recovered, Judge Kelly said plaintiff "failed to create a genuine issue of fact as to whether the object that caused the decedent's death was slag" (Exhibit A: Kelly dissent, p 3). Judge Kelly said "plaintiff 'posited a causation theory premised on mere conjecture and possibilities'" (Exhibit A: Kelly dissent, p 4).

As to duty, Judge Kelly said that as a matter of law, Sevigny/JRP "owed no duty to the decedent to detect and remove that object" and that IMS had no independent duty under its contract with NSS (Exhibit A: Kelly dissent, p 4, n 1). She also stated that

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because Plaintiff pointed "to no case or statute establishing a special relationship or circumstance" and "no regulation or industry standard imposing a duty of inspection before entering onto a public roadway," there were "no genuine issues of fact regarding 'what characteristics giving rise to a duty are present'" (Exhibit A: Kelly dissent, p 5).

On October 14, 2005, this Court, pursuant to MCR 7.302(G)(1), directed the Clerk to schedule oral argument on whether to grant the application[s] or take other peremptory action ... ." The Court permitted additional briefing and further directed the parties to address at oral argument "whether plaintiff created a genuine issue of material fact regarding: (1) the duty owed plaintiff's decedent by the slag contractor, the truck driver and the truck owner; and (2) proximate causation as to all defendants" (Exhibit B: Orders).

Defendants claim that the decision of the Court of Appeals is clearly erroneous, will cause material injustice and that the issues raised are of major significance to Michigan's jurisprudence. MCR 7.302(B)(3), (5). Careful review of the facts, the law and the majority opinion establishes, however, that the Court of Appeals majority correctly applied the law to the facts. Accordingly, this Court should affirm the Court of Appeals and remand this matter to the trial court for further proceedings or a trial before the constitutional factfinder.

Defendants' appeals are timely, and this Court certainly has discretionary jurisdiction to review the Court of Appeals decision. But, the majority opinion is fundamentally sound and now, after more than five years of legal wrangling, this Court should afford the Estate of Sheri L. Williams the opportunity for a jury determination of whether North Star Steel, International Mill Service, Marc Sevigny and/or J.R. Phillips

Trucking are liable for her tragic and premature death.

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Counterstatement Of Material Facts And Proceedings

A. Introduction

Sheri Williams was just 27 years old when she was killed that morning. Plaintiff's theory of the case is that Sevigny's truck tires picked up a chunk of "A scrap," or slag, negligently left in the roadway of the NSS/IMS premises which became lodged between the dual tires of the truck. As the truck accelerated down East Front Street, the chunk of metal first left gouge marks in the pavement, but then dislodged from the tires and became a deadly missile, crashing through the windshield of Sheri Williams' vehicle, hitting her in the face and causing her death. Plaintiff contends that the object that was between the tires of Sevigny's vehicle made the fresh indentations that were found by the police in the apron of the driveway of NSS and that continued through the Westbound lanes and paralleled the centerline of the Eastbound lanes.

Sevigny either failed to perform a proper safety inspection of his tires or he improperly and incompletely inspected them near the scales three quarters of a mile inside the NSS premises and then traveled over the debris littered roads on the premises and failed to inspect them at the exit gate from the premises. Simply stated, if the jury concludes that Sevigny properly inspected the tires near the scales, the inspection should have been done again at the exit after traveling over the worst of the premises roads which NSS and IMS failed to keep clear of such large debris despite their knowledge that the very tragic event that happened on October 13, 1999 could happen. Alternatively, if the jury concludes that Sevigny improperly inspected the tires near the scales, NSS might be

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relieved of liability, but Sevigny, his employer JRP and IMS which failed to keep its leased property clear of "A scrap" or "slag" chunks may still be found liable. All of the direct and circumstantial evidence has a tendency to support Plaintiff's account of how the accident occurred and that it was caused by the four Defendants' negligence. The claim is not based on mere speculation. Plaintiff strongly argues that it was not merely coincidence that the grooves on the driveway apron of the premises and in East Front Street ended in the immediate area of the accident where the shattered glass is depicted in the police drawings.

This Court has long recognized the common law maxim "sic utere tuo ut alienium non laedas" which means "so use your own property in such a manner as not to injure that of another." See e.g. *Shavers v Attorney General*, 402 Mich 554, 596 (1978); *Iamurri v Saginaw City Gas Co*, 148 Mich 27, 53 (1907); *Gildersleeve v Hammond*, 109 Mich 431, 434 (1896); *Robinson v Baugh*, 31 Mich 290 (1975). That maxim has lost none of its potency with the coming into common use of new agencies of injury or destruction.

The majority at the Court of Appeals ably analyzed the facts and law in this case and determined that the jury should determine liability. This Court should acknowledge the wisdom of that decision and order that this case should proceed to a jury trial on the merits.

B. Counterstatement Of Material Facts

1. Death On East Front Street

At about 8:30 a.m. on October 13, 1999, Sheri L. Williams was fatally struck in the face by an object that crashed through her windshield as she passed by an oncoming

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tandem semi truck driven by Defendant Sevigny and owned by Defendant JRP. The truck, which was bound for Windsor, Ontario, had just exited from Defendant NSS premises onto East Front Street when Williams was hit. NSS contracts with Defendant IMS which leases part of the NSS property and processes and disposes of scrap steel/slag produced by NSS in its steel process.

Early that morning, two JRP trucks with tandem trailers arrived at NSS/IMS to pick up loads of "slag" or "A scrap," which is the largest size of scrap. According to Sevigny, the terms "slag" and "A scrap" are used interchangeably, and they are the same (Exhibit C: Sevigny dep, p ____). "Slag" is actually comprised of a number of metallic objects, including corroded steel, scrap steel of unknown origin within the plant, and any type of steel/iron from any broken part of machinery within the plant. What Mr. Sevigny was actually hauling was best conveyed by photographs of his load taken at the accident scene by Officer Ansel (Exhibit D). These pictures clearly depict rock-like pieces of steel and iron, angle iron, piping and the like. While others may define "slag" in more technical terms, it is clear to all parties involved in this case that the debris, allegedly caught between the tires of Sevigny's truck, could have been any one of the various objects displayed in the photos of Exhibit D.

IMS maintains "slag piles" with the larger "A scrap" and the smaller "B scrap" in different piles. The first two trucks to arrive at IMS that morning were driven by Sevigny (#48) and by Dean Rioux (#41) (Exhibit C: Sevigny dep, p 21). Thomas Kuehnlein who loaded the trucks that morning stated unequivocally that they were loaded with "A scrap" (Exhibit E: Kuehnlein dep, pp 11-12). According to NSS records Rioux's truck was

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loaded at 7:31 a.m. and Sevigny's truck was loaded at 8:01 a.m., with the pup, or second trailer, loaded at 8:03 a.m. (Exhibit F: Stearns Trucking Tickets). Stearns, the IMS employee who saw a truck driver pull something from between his tires, identified this incident as involving the first, i.e. Rioux's truck (Exhibit G: Stearns dep, p 14).

Sevigny claims he inspected his tires near the IMS scales and then proceeded to drive approximately three quarters of a mile over mostly gravel roads on NSS premises until the exit apron, an asphalt driveway, by the NSS security tower at the main entrance/exit. Rioux was the first truck to leave NSS from the IMS yard. He was approximately one half mile up Front Street and near I-75 when Sevigny, his friend of 20 years informed him of the accident (Exhibit H: Rioux dep, pp 84-85). Rioux immediately returned to the scene.

Sevigny, whose statements to investigators vary greatly from his later sworn deposition, was in the center Westbound lane. His truck and Williams' vehicle were the only ones in the area (Exhibit I: Tr 11/06/02, p 25). As Sevigny passed Williams' Escort, he heard an explosion, which he claims he thought was one of his tires blowing out (Tr 9/26/01, p 23; Tr 11/06/02, p 24). When he looked in his side mirror, he saw Ms. Williams' car veer over to the left behind his truck, almost striking the rear "pup" (Exhibit I: Police Report, p 5 of 11)(Exhibit C: Sevigny dep, p 15). He pulled off the road and called Rioux.

Rioux and Sevigny were joined at the scene by Bradley Phillips, co-owner of JRP who was on his way to NSS. He spoke to both drivers, but left before Monroe Police Officer Ansel arrived and never acknowledged being at the scene until much later (Exhibit

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I: Police Report, p 5 of 11). It was not until Ancell confronted Bradley about being there after he reviewed a video from the first police cruiser at the scene that Bradley admitted that he had been there. Rioux said Sevigny told him during the initial call to him that "a woman got into an accident" and that he [Sevigny] "may be responsible." Rioux testified that Sevigny told him that he thought something came from his tires to cause the accident (Exhibit H: Rioux dep, p 83).

Police and rescue workers quickly arrived to find the Escort off the Westbound shoulder of Front Street with Ms. Williams slumped over toward the front passenger seat of the vehicle, unconscious, with a massive head wound. She was rushed to the hospital, but died several hours later.

Despite several intensive searches, and the fact that the object which killed Ms. Williams must have been sizeable, it was never found (Exhibit D: Police Photo of Windshield; Tr. 11-06-02, p. 23). Cadaver dogs were brought to the scene in the hope that they could pick up a human scent on any debris. There were only four people at the scene of the accident before Officer Ansel arrived. Three of them were from JRP [Sevigny, Rioux and Phillips]. The fourth was a Good Samaritan who stopped to offer assistance to Ms. Williams.

Testimony from every police officer involved in this case has indicated that it should have been possible to locate the foreign object at the scene (Tr. 11-06-02, p. 23). Michigan State Police Lieutenant Lawrence Richardson, who was called in to participate in the accident reconstruction, testified that due to the size of this object, it should have been found at the scene (Exhibit J: Richardson dep, pp. 111-112). Defendants' expert, Matthew

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Brach, testified that, from his calculations, the object should have been in an area in the vicinity where in would easily be found (Exhibit K: Matthew Brach dep, p. 77).

The clear inference is that someone removed the object from the site before the police arrived. Although he denies spoliation of the scene, the most likely candidate is Bradley Phillips, part owner of JRP, who arrived at the scene shortly after the accident occurred, spoke with Sevigny, and then left without speaking with police or ever telling anyone else including his co-owner brother that he had been at the scene until he was confronted about it by Ancell (Exhibit L: Phillips dep, pp 7-11).

2. The Police Investigation

An extensive investigation was conducted at the accident scene by the Monroe Police Department. Immediately after the accident, Monroe Police Lt. Danny E. Richards alerted Officer Brett Ansel, who was in charge of the accident investigation, that he had found gouge marks in the pavement, which started back inside the main entrance of NSS, continued over 1100 feet in the direction of the accident site, and ended approximately where the broken glass of Ms. Williams' windshield was located.[1] (Tr. 11-06-02, pp. 24-25). The gouge marks were equally spaced at 10'8"apart. Not coincidently, this is the exact circumference of the tires on Sevigny's truck. Lieutenant Richards testified he assisted Ansel at the scene for about an hour and a half:

[1] Sgt. Richardson, an accident re-constructionist for the Michigan State Police, initially testified that the groove marks were not relevant since they could have been made by any truck. But Sgt. Richardson had not been told that these marks were found by Lt. Richards right after the accident, and brought to the attention of Ansel (Tr. 9-26-01, p. 22).

Q: Can you be specific about what you did to assist?

A: I found -- like in looking at the scene, I found gouge marks in the cement, which would have been in the inside, westbound lane east of East Front Street. Corporal Ansel measured them and we found them to be about 10'8" apart. These grooves stopped right where the broken glass had started in the east bound lane.

Q: I am sorry, sir, where were the gouge marks?

A: On the inside lane of the westbound traffic lane. (Exhibit M: Richards dep, pp 10-11).

The grooves were "fresh" (Exhibit M: Richards dep, pp 38-39). In addition, glass from the car's windshield was located near the area where the grooves in the roadway ended (Exhibit N: Richards dep, pp. 11, 56-57; Exhibit N: Ansel dep, pp 97, 149).

A former employee of IMS, Scott Larner, advised Corporal Ansel during his investigation that ***it would be very possible*** for a truck to pick up slag in its tires, particularly if the driver had ***backed up to the pile*** to dump part of his load which is what Sevigny testified he did (Exhibit I: Police Report, p 6 of 11)(emphasis added).

It is clear that the object was propelled from the left side of the truck. There were signs of damage to the back of the first trailer including a fresh "gouge mark" which was "scuffed up and not down" and therefore was inconsistent with other scuff marks on the truck (Exhibit O: Chapp dep, p 52). Lieutenant Richards concluded that slag or concrete came from the truck tire and crashed through Ms. Williams' car windshield. He based this on the fact that the gouge marks stopped in the area of the broken glass from the car windshield. (Exhibit M: Richards dep, pp. 56-57).

There was also significant physical evidence to suggest that an object may have

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been lodged in either the fourth or eighth axle of Sevigny's vehicle, which just prior to the accident had traversed the route where the gouge marks were found. Corporal Ansel noted a "darkened area" on the left side tires of the fourth axle where it looked "like something was wedged in between the two tires at that axle." (Exhibit I: Police Report, p. 3 of 11).

Neither the truck, nor the tires, were immediately confiscated by the police, and Sevigny continued to drive the truck to its destination in Canada (Tr. 11-06-02, p. 26). The following day, the Monroe Police Department contacted Defendant JRP, requesting that the truck be returned to Monroe in the condition it was in at the time of the accident. The truck was not returned until late the following day, and by the time it was handed over to the police, several tires and a hub had been changed. In fact, Sevigny later testified that one of the tires that had been changed was the one from which he had allegedly pulled out a piece slag just before this accident occurred (Exhibit C: Sevigny dep, p 28).[2] Defendant JRP eventually delivered to the Monroe Police the items which were allegedly removed from the truck, but again, the tires that were handed over did not have the cuts described in the accident investigation (Tr. 11-06-02, p. 26).

Defendants claim the tires were changed because "they had big cuts in the thread [sic]" (Exhibit C Sevigny dep, p. 51; Exhibit L: Gregory Phillips dep, pp 12-19). However, none of the tires handed over to the police were cut or damaged in this fashion. No one has explained this discrepancy (Exhibit N: Ansel dep, p 122).

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[2] There is evidence that Mr. Sevigny may never have pulled a piece of scrap from the tire of his truck just before the accident, and that in fact, only Mr. Rioux was seen pulling a piece from his tires, negating the credibility of Defendant Sevigny's story that he did any inspection at all (Tr. 9-26-01, p. 20 and Exhibit G: Stearns dep, p 14).

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3. The Lay Deposition Testimony

Sevigny attempted to explain the gouge marks by testifying that before he left NSS/IMS on the day of the accident his truck had weighed in too heavy, so he had backed up and dumped off a some of the A scrap (Exhibit C: Sevigny dep, p 14). At that time, he said he noticed a chunk of metal between the tires of the truck. He alleges that he pulled out the chunk and threw it back on the slag pile, and then continued the three quarter mile over the unimproved premises roads out the gate to East Front Street where the accident occurred (Exhibit C: Sevigny dep, p. 28). As previously set forth, Sevigny's inspection claim is rebutted by Stearns' testimony (Exhibit G: Stearns dep, p 14). Sevigny admits that he "wouldn't know" if he had picked up something else in his tires in the 3/4 mile before leaving NSS, but admits, if he had, it would be a hazardous condition if it came flying out (Exhibit C: Sevigny dep, pp. 36-37).

Sevigny, along with many other witnesses in this case, admitted that anything caught between his tires would represent a hazardous condition, which is why he allegedly inspected his tires while on the IMS/NSS premises (Exhibit C: Sevigny dep, p 29). Sevigny testified that the roads were not good within the premises of IMS and NSS and that there was "a lot of stuff laying all over the place" including "A scrap" (Exhibit C: Sevigny dep, pp 28-29). Sevigny was aware that trucks traveling through NSS pick up slag in their tires (Exhibit C: Sevigny dep, p 63).

Michael Roper, Works Manager for NSS, testified that it was the responsibility of NSS, IMS, and Hydrotech to maintain the roadways within the NSS premises (Exhibit P: Roper dep, pp 37, 63). This duty included removing chunks of debris from the roadway.

He also testified that, according to the contract between IMS and NSS, IMS was required to maintain roads beyond just the roads within the IMS area (Exhibit P: Roper dep, p 63). Picking up debris from the roadways of NSS falls under the "good housekeeping" practices of NSS (Exhibit P: Roper dep, p 72).

The contract is not limited to debris made up of steel/slag, but extends to debris of any kind, such as wood or chunks of concrete. But, the sweeper was mostly for dust collection and could not pick up large chunks of debris which would actually damage it. The sweeper driver would drive around large debris. Nonetheless, no matter what material comprised the object that hit and killed Ms. Williams, IMS would be responsible if it was picked up in the tires of the truck while the truck was on the IMS/NSS premises.

Richard Hahey, former supervisor of IMS, acknowledged that as a matter of good safety practice and not by contract, all IMS employees are required to remove pieces of debris from the roadways, not only in the IMS work areas, but throughout the NSS plant (Exhibit Q: Hahey dep, pp. 27; 47-48). Hahey further agreed that large pieces of debris could be caught up between the dual tires of a truck. An object, four to six inches in diameter, the size of the projectile in question based on the size of the hole in the windshield (Exhibit D: Police Photo of Windshield), would constitute a safety hazard if it was located in a traveled portion of the road. While every "good" truck operator checks his tires every time his truck stops, most truck drivers are "ignorant" and do not check their tires (Exhibit Q: Hahey dep, pp 44-45).

James Jonasen, Vice-President and General Manager of NSS when the accident occurred, testified that large pieces of debris in the roadway would constitute a hazard

within the NSS/IMS property.

Q: Do you believe large pieces of debris on the roadways created hazards?

A: If they are on the roadways, then, yes, I would agree with that.

Q: They create hazards not only to people walking the roadways, but to trucks driving through those roadways, correct or vehicles driving besides trucks, correct?

A: Depending on the size of the object, yes.

Q: And there is a chance that the object could become lodged between the tandem wheels of a truck, correct, and become dislodged later, outside the premises of North Star Steel, correct?

* * *

A: A piece of material the right size could be lodged between tires anywhere, yes, at any time, and come out at any time. (Exhibit R: Jonasen dep, pp 23-24).

Jonasen also acknowledged that leaving large pieces of debris on the roadway posed an unreasonable risk of harm (Exhibit S: Jonasen dep, p 26).

Nonetheless, Dennis Garbig, regional environmental manager for NSS testified that, to his knowledge, there is no effort made by anyone within NSS to keep the roadways clear of debris (Exhibit S: Garbig dep, p 9). He has seen six-inch chunks of material lying in the road, yet he personally has done nothing about them (Exhibit S: Garbig dep, p 16).

4. The Expert Testimony

Plaintiff retained the services of Scott F. Stoeffler, a senior research microscopist. Mr. Stoeffler previously worked in the crime lab for the Michigan State Police Department. He performed a detailed inspection of the automobile in question and issued a report.

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Based on his examination of the evidence, Mr. Stoeffler's stated that the object which pierced Ms. Williams' windshield, struck the car dash, struck Ms. Williams in the side of her face (impacting her sunglasses), and continued out the back window of the vehicle, was metallic, comprised primarily of steel. This is based on Stoeffler's finding of metal particulates within the vehicle itself in the glass laminate, the dashboard, back of steering wheel, Ms. Williams' sunglass lens and strewn over the back deck below the rear window. (Exhibit T: Affidavit of Scott F. Stoeffler).

Mr. Stoeffler also found evidence of paint in the samples (Tr. 11-06-02, p. 25). Mr. Stoeffler's unrebutted findings are that the object was clearly not cement or asphalt as Defendants initially argued. The particulates are absolutely consistent with the material in the IMS slag piles and on the roadways at NSS.

Even an NSS expert, Matthew Brach, an accident re-constructionist with a PhD in mechanical engineering, admitted in his deposition that physical evidence showing gouge marks in the road, continuing back to the NSS driveway, would lead him to the conclusion that an object was picked up in the truck's tires before Sevigny left the facility (Exhibit K: Brach dep, pp. 72). Brach also admitted that the only feasible explanation for this accident is that the object that went through Ms. Williams' windshield came from a vehicle in the oncoming lane. Further, he agreed that Sevigny's truck was the only vehicle in the area at the time. Finally, the object *more than likely* was propelled out from the tires of the oncoming vehicle (Exhibit K: Brach dep, pp 35-36, 48-49).

Many additional facts are set forth in the specific context of the issues of duty and proximate cause that follow.

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C. The Trial Court Proceedings

On May 17, 2000, Plaintiff filed this lawsuit. The Complaint, as amended, alleged a negligence/gross negligence/willful and wanton misconduct claim, negligence hiring negligent supervision and vicarious liability claims against NSS, negligence/gross negligence/willful and wanton misconduct by JRP and its driver Sevigny, and negligence/gross negligence/willful and wanton misconduct against IMS (Court File: Plaintiff's 6/1/00 First Amended Complaint).

The case was originally assigned to Judge Joseph A. Costello, but after he denied Sevigny/JRP's motion for summary disposition which IMS had concurred in, IMS moved to disqualify him. The motion was granted, and on November 21, 2001, the case was reassigned to Judge William LaVoy.

Those Defendants renewed their motion, and on March 5, 2002, Judge LaVoy denied the motion, saying the record was "replete with genuine issues of material fact" (Exhibit V: 3/5/02 Decision of the Court, p 3). The judge further found:

> Defendants had a reasonable obligation to ensure that debris from their operations did not injure the foreseeable Plaintiff. Within the context of this case, it would not be an unreasonable standard of care to require that the Defendants maintain clean driveways or inspect tires of leaving trucks for possible debris. It would be foreseeable that a negligent inspection of a truck leaving a slag littered driveway could result in injury should a forcibly dislodged piece of slag strike a fellow motorist. Moreover, Plaintiff has provided sufficient proofs to create a question of fact to get to a jury. (Exhibit V: 3/5/02 Decision of the Court, p 7).

IMS sought reconsideration which was denied on August 14, 2002. An order was entered on September 5, 2002, and IMS sought interlocutory review, which the Court of Appeals denied by Order entered on December 27, 2002 (Court of Appeals Docket No. 243983).

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In the meantime, NSS sought summary disposition, and Sevigny/JRP renewed their summary disposition motion. The trial court heard argument on November 6, 2002, and on November 20, 2002 issued a written opinion granting summary disposition as well as granting JRP's motion in limine to suppress expert testimony of three witnesses proffered by Plaintiffs (Exhibit W: 11/20/02 Decision of the Court). The judge concluded that Plaintiff could not establish proximate cause as to NSS or JRP, and that JRP owed Plaintiff's decedent no duty as a matter of law. As to proximate cause, the judge said:

> In the case at bar, there lack adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiffs' expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiffs' allegations lack the requisite linkage. While Plaintiffs' theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury. (Exhibit W: 11/20/02 Decision, pp 5-6).

With respect to duty, Judge LaVoy found the unpublished Court of Appeals decision in *Malloy v McClure Trucking*, No. 223405 (rel'd 8/21/01) persuasive, and held that JRP owed Plaintiff "no legal duty to inspect their truck tires upon leaving the North Star and IMS facility given the 'unusual sequence' of events which resulted in decedent's death was simply not reasonably foreseeable'" (Exhibit W: 11/20/02 Decision, p 8).

The trial judge directed the parties to bring to his attention any outstanding motions not resolved by the November 20, 2002 decision. Notwithstanding his earlier decision with respect to IMS, on December 2, 2002, the judge issued another opinion finding that his November 20, 2002 decision applied also to IMS (Exhibit X: 12/02/02 Order).

On January 29, 2003, the trial court entered an order dismissing all Defendants and

claims, and, after some housekeeping matters, Plaintiff's appeal of right was docketed at the Court of Appeals.

Law And Argument

Counterstatement Of Standard Of Review

Appellate courts review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998); *Bergen v Baker*, 264 Mich App 376 (2004). When reviewing a summary disposition motion under MCR 2.116(C)(10) based on lack of a material factual issue, an appellate court assesses the substantively admissible evidence in the light most favorable to the party who opposed the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). Circumstantial evidence can be evaluated and utilized to determine whether a genuine issue of material fact exists for purposes of summary disposition. *Bergen v Baker*, 264 Mich App at 387; *Rymal v Baergen*, 262 Mich App 274, 311 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v General Motors Corp*, 469 Mich 177, 183 (2003).

Here, as will be demonstrated, the Court of Appeals majority correctly found factual questions regarding the characteristics giving rise to a duty by Defendants and determined that the duty issue must be submitted to the factfinder. The majority also recognized that Plaintiffs offered sufficient circumstantial evidence of causation to establish genuine issues of material fact for the jury.

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I. As The Court Of Appeals Majority Recognized, Plaintiff Pleaded And, By Way Of Affidavits, Depositions And Documentary Evidence, Set Forth Facts From Which A Jury Could Conclude That Sevigny/JRP Had A Legally Cognizable Duty To Check The Truck Wheels And Tires For Slag And That IMS Had A Legally Cognizable Duty To Scour The Roadways On The NSS Premises For Foreseeably Dangerous Pieces Of Slag.

Per the Court's October 14, 2005 Orders, Plaintiff specifically addresses "the duty owed plaintiff's decedent by the slag contractor [IMS], the truck driver [Sevigny] and the truck owner [JRP]."

A. The Duty Element.

As stated in *Schultz v Consumers Power Co*, 443 Mich 445, 449 (1993), the requisite elements of a negligence cause of action are that defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Roule v Automobile Club of Michigan*, 386 Mich 324 (1971). The duty element questions whether an actor has a legal obligation "to so govern his actions as not to unreasonably endanger the person or property of others" *Schultz*, *quoting Clark v Dahlman*, 379 Mich 251, 261 (1967). The *Schultz* Court, quoting *Prosser & Keeton, Torts (5th ed)*, §53 p 356 made it clear that "in negligence cases, the duty is always the same - - to conform to the legal standard of reasonable conduct in the light of the apparent risk."

In *Buczkowski v McKay*, 441 Mich 96, 101 n 4 (1992), Justice Boyle, again citing *Prosser & Keeton*, identified the variety of factors that "consistently go to the heart of a court's determination of duty [ ] including: foreseeability of the harm, degree of certainty

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of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach." In *Schultz*, this Court listed foreseeability and nature of the risk and the relationship of the parties, and declared the existence of a sufficient relationship the most important variable in the duty factors.

As Judge Smolenski's opinion recognized in this case, while duty is usually a question of law for the court, it is also well-settled that "if there are factual circumstances that give rise to the duty, the existence of those facts must be determined by a jury" with an appropriate instruction regarding a defendant's duty conditioned upon the jury's resolution of the factual dispute. *Farwell v Keaton*, 396 Mich 281, 286-287 (1976).

Here, as the majority recognized, the focus was foreseeability of harm which in this case depends on the conditions of the roads and whether Sevigny satisfied any duty to inspect his tires for errant pieces of slag. Sevigny/JRP did have a legal duty to inspect his tires for foreseeable pieces of slag. Likewise, IMS had a legal duty to keep the roads on the IMS/NSS premises free of errant pieces of slag that might foreseeably lead to exactly the tragedy that occurred to Sheri Williams.

B. Duty of Sevigny/JRP

The Court of Appeals dissent is wrong in asserting that there is no regulation or industry standard imposing a duty of inspection upon Sevigny/JRP under the circumstances presented. Michigan State Police Motor Carrier Officer Paul Chapp interviewed Sevigny post-accident to determine "the condition of the equipment and the contributing factors of the equipment to the crash" (Exhibit O: Chapp dep, p 39). At Chapp's deposition, he

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explained:

A. I started asking him, you know, his mud flaps, the condition of the vehicle, the condition of where it was loaded. At which point, he further, you know, explained that there was debris in the yard where he had found debris between the duals. And that he had struggled and worked to dislodge the debris from the tires.

And then when I further asked him, I said, did you check top and bottom of all the tires - - since you found debris in one location, did you check top and bottom of the tires - - of all the tires.

And, at which point, he said to me he just looked from the top across all of them.

And then I had to ask him again, I says, well, you know, did you roll forward and check again, top and bottom.

And he said, no, he didn't. He said he just looked across the top. When he didn't see debris, he moved on.

* * *

Q If a driver did an improper inspection, that would be a violation of the Motor Carrier Act, wouldn't it?
A If he did, correct.
Q Okay. So I take it, since you made no note that he had done an improper inspection, you did not come to the believe that he had done an improper inspection, correct?
A That's correct.
Q Okay.
A I couldn't prove, one way or the other, that he did or he did not.
Q If you felt that he had, you'd have cited him, wouldn't you?
A I wouldn't be able to because this was after the fact.
(Exhibit O: Chapp dep, pp 38-40).

Later, Mr. Chapp's Affidavit explained the basis for his statement that Sevigny/JRP had a legal duty to inspect his tires for potential hazards:

6. That Section 396.7 of the Federal Motor Carrier Safety Regulations require that a motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.

7. An improper inspection of the tires of a motor carrier vehicle such as the one operated by Mr. Sevigny on the day of this accident, would be a violation of CFR, Section 396.7.
(Exhibit O: Chapp Affidavit 9/24/01).

A copy of the 49 CFR 396.7 regulation is attached as Exhibit Y. Also attached is 49 CFR

396.3 titled "Inspection, repair, and maintenance" which states in relevant part:

> (a) General. Every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control.
>
> (1) Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.
>
> * * *
>
> (Exhibit Y).

Further, 49 CFR 396.13 regarding "Driver inspection" states in relevant part: Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition (Exhibit Y).

These federal regulations are specifically enforced by Michigan State Police Motor Carrier Officers through the Motor Carrier Safety Act of 1963, PA 1963, No 181, Eff Sept 6, 1963. MCL 480.11a(1)(b) specifically adopts these federal regulations. MCL 480.12b specifically precludes operation of any truck, truck tractor or trailer" from driving any truck, or truck tractor" ... "which does not meet driver or operator safety standards, safety standards for equipment and devices on [ ] trucks, truck tractors, or trailers ... ." These statutes and regulations establish a legal duty with respect to both Sevigny and JRP.

The majority opinion of Judge Smolenski aptly summarized the foreseeability testimony (Exhibit A: Smolenski Opinion, pp 5-6). Witness after witness testified that an accident such as the one that occurred here was definitely foreseeable. Sevigny claimed that while at the IMS yard he found a big chunk of metal in his tires and removed it. He admitted that a hazardous condition would be created if he picked something up in his tires

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and failed to remove it (Exhibit C: Sevigny dep, pp 36-37). He admitted that "a lot of stuff [slag or A scrap] was laying all over the place, some of it in the roads at North Star Steel and IMS (Exhibit C: Sevigny dep, pp 28-29).

Despite the dissent's Court of Appeals statement to the contrary, there was also testimony suggesting an industry standard or at least JRP's own custom regarding looking for hazards in the tires and wheels that supports the majority's duty analysis. Although the evidence indicated that as Motor Carrier Officer Chapp testified, Sevigny was inexperienced and may not have even known how to properly and completely check the tires for foreign objects, Bradley Phillips explained that JRP's trucks are equipped with steel bars or hammers to pound the outside of the tires and to listen to the sound difference to discover if something is wedged in them (Exhibit L: Phillips dep, p 17).

Sevigny did not do this and in fact was unfamiliar with that procedure. He said he merely walked around the tires and visually examined them or kicked the bottom of the tire with the steel toe of his shoe (Exhibit C: Sevigny dep, pp 44-47). In fact, he did not know any other way (Exhibit C: Sevigny dep, p 49). This testimony demonstrates both foreseeability and knowledge that care should be taken to prevent exactly the tragedy that occurred here.

Sevigny/JRP and the trial court relied upon an unpublished Court of Appeals decision, *Malloy v McClure Trucking*, No 223045 (8/21/01), but that case is clearly distinguishable. In *Malloy*, a rock dislodged from a truck tire and crashed through plaintiff's decedent's windshield, killing him. Plaintiff sued the truck driver and Nemroc, the owner of the yard, where the truck had picked up the rock. Plaintiff settled with the

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Nemroc, and the trial court dismissed the truck driver, finding that he had no duty to inspect his tires prior to leaving the yard where "the accident that befell decedent was not reasonably foreseeable." In *Malloy*, the truck driver had made regular deliveries to Nemroc's yard, but there was no evidence that on any prior occasion a rock from the yard had lodged in a tire of his truck. Here, the record is replete with evidence that as IMS crane operator Dave Sterns testified, it was common for drivers to pick up pieces of slag while driving on the facility grounds" (Exhibit A: Smolenski Opinion, p 5). The situations in *Malloy* and in this case are clearly distinguishable.

The dissent at the Court of Appeals misconceives legal duty as essentially requiring a special relationship. While "special relationship" is one of the constellation of enumerated duty factors, there is no authority for this novel proposition that it is a "sine qua non" factor. The relationship here is cognizable as one of due care that a motorist on a public highway owes to another motorist on that highway.

Judge Kelly also misconstrued Plaintiff's argument regarding the time or place of the inspection. It is Plaintiff's contention that the only proper place to inspect the tires is at the gate of NSS just before entering onto the public roadway. As Plaintiff argued in her brief at the Court of Appeals, it makes no sense to do an inspection before driving over the worst portion of the NSS/IMS roads which Sevigny himself testified were in poor condition. Further, Judge Kelly's statement that there is no evidence that Sevigny picked up any object **before** leaving the NSS premises is squarely rebutted by Suttle's testimony that from the tower at the gate he clearly saw at least four or five circles painted around the grooves by investigators on the NSS driveway *before* the grooves started appearing on the

East Front Street roadway (Exhibit AA: Suttles dep, p 60).

With respect to the other factors in the duty analysis, there was a close connection between Defendants' alleged breach of duty and the tragic death of Sheri Williams seconds later on East Front Street. There should be utmost concern supporting a policy of preventing future harm where simply articulating a duty for truck drivers to be more safety conscious and to check their tires for big chunks of metal or other potentially lethal missiles could prevent the horrible death of a completely innocent driver or passenger in another vehicle or a pedestrian. It cannot be seriously argued that this is too burdensome a duty or that society would find the imposition of such a duty undesirable.

The Court of Appeals majority's conclusion that "the issue of Sevigny's duty, and therefore Phillips' duty, is properly an issue for the jury to resolve" is amply supported by the affidavits, depositions and documentary evidence Plaintiff proffered in this case. With respect to the duty of Sevigny/JRP, the Court of Appeals should be affirmed.

C. Duty of IMS

Quoting this Court's recent opinion in *Fultz v Union-Commerce Associates*, 470 Mich 460, 467 (2004), Judge Kelly's dissent at the Court of Appeals also stated that IMS had no duty because Plaintiff failed to establish a duty that was "separate and distinct" from the IMS contractual obligation to keep its premises "clean and free" from debris, i.e. slag (Exhibit A: Kelly dissent, p 4, n 1). But Plaintiff's argument with respect to the duty of IMS was never limited solely to the duty imposed by contract.

In fact, the contract basically refers to sweeping the roads and watering them down for dust control purposes only. Hahey from ISM and Suttles from NSS both testified that a

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large object caught between the dual wheels on a truck's axle is a known hazardous condition.

The safety manager for NSS at the time of the accident, David Suttles, testified that while there was no formal policy, he would expect anyone who saw an object, such as a piece of steel on the roadways, they would stop and remove it. He testified that IMS swept and graded the roads, but when he was asked who is *responsible* for keeping the roads clear of hazardous materials he incredibly answered "it's not my job to know" (Exhibit AA: Suttles dep, pp. 25-29, 32, 44). Suttles admitted that a 6-inch diameter piece of steel on the roadway within the NSS/IMS premises would be a safety hazard (Exhibit AA: Suttles dep, pp. 46-47).

Michael Roper said that IMS shared the duty of picking up debris from the roadways on the premise as part of the duty of "good housekeeping" practices (Exhibit P: Roper dep, p 72). Scott Larner, Site Clerk for IMS, agreed that a six inch piece of slag on the NSS roadway would constitute a safety hazard (Exhibit Z: Larner dep, p 47). Nonetheless, Larner claimed that by contract IMS was only responsible for dust suppression on the roads (Exhibit Z: Larner dep, pp 24-25). The testimony of Jonasen, Stearns and Cutter set forth at pages 5-6 of Judge Smolenski's opinion indicates that as employees of NSS and IMS everyone was aware of the dangers such large chunks of slag might pose under the exact circumstances that Plaintiff alleges occurred here.

Moreover, the *Restatement 2d, Torts* §371 subjects IMS/NSS to a duty and to liability under the facts presented:

§ 371 Possessor's Activities

A possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place.

Comment "a" states that "a highway ... is a neutral place, since normally any two persons have the same privilege of using it." Comment "b" reiterates that "An act involving a risk of bodily harm to others does not subject the actor to liability unless he should not only recognize the risk involved in his act, but should also recognize that the risk is unreasonable." The Illustration given is that of a possessor of land burning brush which blows a thick curtain of smoke across a highway. Caselaw examples include *Brown v Nebraska Power District*, 209 Neb 61 (1981); *Timmons v Reed*, 569 P2d 112 (Wyoming 1977); *Westerman v Stout*, 232 Pa Super 195 (Pa Super 1975) and *Hudson v Grace*, 348 Pa 180 (1943). Appellate decisions in other jurisdictions have extended the duty in §371 to situations beyond escaping smoke, fog and steam. See *Cessna v Coffeyville Racing Assn*, 298 P2d 265, 267 (Kan 1956) [wheel flew from race car at track and struck person off-premises]; *Bolton v Smythe*, 432 So2d 129, 130 (Fla App 1983) [lawn sprinkler spraying water on road creating hazardous condition to motorcyclist]; *Vermillion v Pioneer Gun Club*, 918 SW2d 827 (Mo App 1996) [stray bullets from range]; *Saldi v Brighton Stock Yard Company*, 181 NE2d 687, 690 (Mass 1962) [escaped livestock]; *Fleming v Garnett*, 646 A2d 1308, 1313 (Conn 1994) [tractor trailer driver not warned of danger of using driveway which was not wide enough to allow trucks to enter highway without blocking all oncoming lanes of traffic]; *Bober v New Mexico State Fair*, 808 P2d 614, 620 (NM 1991)

[improperly designed exit onto public highway where accident occurred]. Accordingly, §371 and the cases applying it squarely support the finding of a legal duty with respect to IMS and NSS as a possessor of the land.

Thus, a jury should decide whether given the acknowledged conditions of the roads that the JRP trucks traversed on the premises, IMS and NSS had a cognizable duty as a matter of good safety practice to keep the roads free of errant pieces of slag that posed a known safety hazard. This duty issue should also be submitted to the jury.

II. The Court Of Appeals Majority Correctly Found That Plaintiff Submitted Sufficient Circumstantial Evidence To Exclude Other Explanations And To Permit A Jury To Determine Whether Sheri Williams' Death Was More Likely Than Not Caused By An Errant Piece Of Slag From The NSS/IMS Premises Which Wedged Between The Sevigny/JRP Truck Tires And Then Was Propelled Through Her Windshield Killing Her.

This Court's October 14, 2005 Orders directed the parties to address "proximate causation as to all defendants."

A. The Causation Element

Proof of causation requires both cause in fact and legal, or proximate, cause. *Skinner v Square D Co*, 445 Mich 153, 162-163 (1994) citing *Moning* v *Alfono*, 400 Mich 425, 437 (1977); *Davis* v *Thornton*, 384 Mich 138, 145, 180 NW2d 11 (1970). Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct. *Skinner*, 445 Mich at 163, *citing Prosser & Keeton, Torts (5th ed)*, § 41, p 266. "On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held

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legally responsible for such consequences." *Skinner*, 445 Mich at 163. A plaintiff must adequately establish cause in fact first. Legal cause or proximate cause becomes a relevant issue only after plaintiff establishes cause in fact. *Id.*

The cause in fact element requires plaintiff to "present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner*, 445 Mich at 165. Plaintiff's cause in fact theory must have "some basis in established fact" and be more than mere "conjecture." *Id.* See also, *Mulholland* v *D.E.C. Intern Corp*, 432 Mich 395, 415-16, n 18, 443 NW2d 340 (1989). Circumstantial proof must facilitate reasonable inferences of causation to be acceptable and not amount to mere speculation. *Id* at 164. In *Skinner*, this Court discussed the legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof.

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Skinner, 445 Mich at 164, quoting *Kaminski* v *Grand Trunk Western R* Co., 347 Mich 417, 422, 79 NW2d 899 (1956).

To say this another way, a plaintiff does not need to negate all other possible causes, but the evidence must exclude other reasonable hypotheses with a fair amount of certainty. Of course, circumstantial evidence cannot prove negligence to an absolute

certainty, but it is only necessary that the chain of circumstances leads to a conclusion which is more probable than any other possibility. All that is necessary is that the proof amount to a reasonable likelihood of *probability* rather than just a *possibility*.

If plaintiff provides substantial evidence that "points to" any one hypothesis, then that theory of causation is removed from the realm of the purely speculative. This evidence need not establish with mathematical precision the causal chain, i.e., the "logical sequence." *Skinner*, 445 Mich at 166. Such exactitude is not only "antithetical to the nature of circumstantial evidence," see *Prosser & Keeton, Torts (5th ed)*, § 41, pp 269-270, but is also not in keeping with the burden of proof in a negligence case. As Judge Smolenski's Court of Appeals opinion recognized, *Skinner* does not require "absolute certainty:"

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. *Skinner* at 166 quoting *57Am Jur 2d, Negligence*, §461, p 442.

Plaintiff's claim is not based on mere speculation and conjecture. Not only has Plaintiff established her theory to be the probable scenario of how this accident occurred, **Defendants have failed to establish any other probable basis**. Certainly, Defendants failed to proffer any scenario that is more likely than what Plaintiff has advanced. As the Court of Appeals majority recognized, "there is no other theory which accounts for an object of metal composition to be thrown with the velocity necessary to travel through Williams' car as it did." (Exhibit A: Smolenski Opinion, p 4). Defendants cannot just say that the object could have been something else, "falling from the sky, or coming from

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anywhere else" (Exhibit A: Smolenski Opinion, p 3).

B. Causation By Sevigny/JRP

The entire Court of Appeals panel agreed that Plaintiff "produced sufficient evidence to create a genuine issue of fact as to whether the object that caused decedent's death was propelled by the truck driven by defendant Marc Sevigny and owned by defendant J.R. Phillips Trucking Ltd" (Exhibit A Kelly Opinion, p 4). That ruling is correct.

The circumstantial physical evidence in this case is more than sufficient to establish a question of fact as to Sevigny/JRP:

- Black marks between two tires on the left side of Sevigny's vehicle indicating something was wedged between the tires;
- Fresh gouge marks, consistent with the circumference of the tires on Sevigny's vehicle in the lane his truck was traveling in;
- The gouge marks end at the point of impact;
- No other semi-trucks or vehicles in the area other than Sevigny's;
- No evidence of a vehicle in front of Ms. Williams;
- The object had to have come from the westbound lane as it traveled from the left lower portion of her windshield through the right upper back window, virtually in a straight line;
- Mr. Sevigny was hauling slag (A scrap);
- Evidence of steel particulates found in the laminate of the front windshield, dash, sunglass lens, and iron particles throughout the vehicle that did not belong there.

Despite Defendants' contentions, this is not a case where a "rock or stone" could have killed Ms. Williams: It is a case where a steel object, perhaps the size of a small

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cannonball, killed her. Looking at this evidence in a light most favorable to Plaintiff, there is sufficient evidence to create an issue of material fact upon which reasonable minds could differ with respect to Sevigny/JRP.

Moreover, the evidence establishes that Sheri Williams was struck by the object at the precise instant that her car passed Sevigny's truck. Sevigny heard a loud noise and then looked in his mirror and saw the Williams vehicle veer left across the Westbound lanes almost striking the rear of his truck. He immediately called his co-worker and friend Rioux and told him what happened. When Rioux returned to the scene, it was obvious that Sevigny realized what had happened. Rioux described him as looking like "he was shaken" (Exhibit I: Police Report, p 5 of 11). He told Rioux, "I hope something didn't come from my tires" (Exhibit I: Police Report, p 5 of 11). A jury could easily conclude that Sevigny who told the investigating officers that "it was very common for semi trucks to pick up slag as they were traveling through the plant" knew that a piece of slag had been propelled from his tires and crashed through the windshield of Williams' Escort.

As Judge Smolenski's Court of Appeals opinion recognized, Plaintiff's expert Scott Stoeffler, a forensic microscopist, submitted an affidavit that the particulates in the windshield laminate, steering wheel, the sunglasses that were on Sheri Williams' face and scattered throughout the deck of the back window where the object exited were metallic and consistent with the slag or "A" scrap Sevigny was hauling. Moreover, the only explanation the NSS expert Matthew Brach could reach after working on the case for two years was the same. An object had become lodged in the tires of Sevigny's truck, it dislodged as the wheels turned and Sevigny accelerated, it was propelled out in an upward

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fashion, struck the truck and then deflected into the windshield of Ms. Williams' vehicle (Exhibit K: Brach dep, p 50). Further, Brach testified that if the marks in the roadway went back into the main driveway as the evidence indicates, Sevigny must have picked up the debris on the premises rather than on East Front Street (Exhibit K: Brach dep, p 72).

Defendants' Application distorts Mr. Brach's testimony by seizing upon his erroneous belief that Sevigny's truck did not come out of the main exit. Once this mistake was pointed out to Mr. Brach he readily agreed with Plaintiff's theory that this was the only way the accident could have happened.

Additionally, every police officer who investigated the accident testified that the only explanation was that something was propelled from the Sevigny truck. For example, Motor Carrier Officer Paul Chapp stated:

> Q Okay, have you come to some determination that they did, in some way, possibly contribute to this crash?
>
> A At the end I came to my personal conclusion that compiling this equipment and the crash vehicle and the proximity both of them were to each other and what the driver had verbalized, time frame-wise, of what he had heard, and then what a witness had seen from behind - - putting these parts all together, it was my conclusion that something had come from the proximity of these tires.
>
> Whether it was this axle or any of the other axles - - and that's why we looked at all the other axles. But something had come from the proximity of the axle height. And I am not sure of the exact angle. It came at an angle and was able to dent the door post, penetrate the windshield, deform the steering wheel, and then exit from the rear of the vehicle. (Exhibit O: Chapp dep, p 34).

Chapp also testified that he had had "numerous cases" in which an object was lodged between the tires and was launched out (Exhibit O: Chapp dep, pp 85-85).

To the extent that Defendants raise res ipsa loquitur and cite *Stefan v White*, 76

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Mich App 654 (1977) for the factors articulated in *Gadde v Michigan Consolidated Gas*, 377 Mich 117, 124 (1966), those factors support submitting the case to the jury. This Court recently reiterated these factors in *Woodward v Custer*, 473 Mich 1, 7 (2005):

> "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff"; and
>
> (4) "evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." (citation omitted).

These factors favor jury submission here:

- This type of accident does not occur in the absence of someone's negligence. Pieces of metal are not routinely flung through vehicle windshields as an everyday occurrence. Negligence may be inferred.

- The truck which caused the accident was under the exclusive control of Defendants, J. R. Phillips and Marc Sevigny. Mr. Sevigny has testified that there were no other vehicles in the immediate vicinity other than his own and Plaintiff's decedent's vehicle.

- The event was not due to any voluntary action or contribution of Plaintiff, as there is no evidence whatsoever that she was negligent in any way.

- The true explanation of the event is more readily available to JRP as they had three individuals at the scene before the police even arrived.

The most significant of these factors to the present case is the fourth one. While Plaintiff has never formally pleaded spoliation of evidence in this case, it is extremely curious that the object which investigators insist they should have been able to locate was never found despite intensive searches. Also at least curious is the fact that equipment including tires from the trailer at the most likely source point where the object was lodged according to

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the on-scene investigators were changed and the changed tires later produced did not appear to the investigators to be the same ones with the cuts in them that they had seen on the trailer at the scene. Add to this the fact that Bradley Phillips of JRP was one of the four people at the scene before police arrived, yet he disappeared before they arrived and did not tell anyone, including his brother and the general manager JRP that he had been there until the issue was raised by Officer Ancel days later. It becomes clear that fundamental fairness compels the submission of this case to the constitutional factfinder for its determination of the liability of all Defendants.

As this Court wisely recognized in *Gadde*, *supra* at 126-127, in wrestling with the res ipsa loquitor doctrine the traditional concepts of the law of negligence and evidence and the application of the decisions of this Court can resolve the problems presented here. As in *Gadde*, the "circumstantial evidence and possible inferences might lead to a finding of negligence." *Id.* Paraphrasing *Gadde*, careful review of the facts and Sevigny's "proximity to the occurrence are sufficient circumstances from which reasonable men [persons] might conclude that he caused or was responsible for the [object]." As the Court of Appeals found, Plaintiff's allegations of negligence are soundly based on established facts and admissible circumstantial evidence, and the causation issue should be submitted to the jury.

C. Causation By IMS/NSS

In large part, the proximate causation issue with respect to NSS and IMS relies upon the same foreseeability evidence and analysis that was discussed in the context of the duty of those Defendants. As this Court reiterated in *Haliw v City of Sterling Heights*, 461

Mich 297 (2001), quoting *Skinner*, 445 Mich at 163: "legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally liable for such consequences." Further, when several factors combine to produce an injury, one actor's negligence can still be a proximate cause if it was a substantial factor in bringing about the injury. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547 (1988). As explained in *Restatement of Torts 2d* §431, Comment "a," "the word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility ... ." As the evidence set forth in Issue I and supplemented here establishes, there is indeed a jury submissible issue of proximate cause regarding NSS and IMS.

Judge Kelly focused upon "but for" causation saying that it was not clear that the object was "slag" (Exhibit A: Kelly dissent, p 3). But, as Plaintiff has explained, corroded steel or scrap steel are included in the generic term "slag" used by the witnesses in this case. Further, Judge Kelly's analysis ignores the gouge marks and the fact that they originated in the driveway apron on the premises. This case is distinguishable from *Moody v Chevron*, 201 Mich App 232 (1993). *Moody* was a products liability warning case which bottomed on the fact that the bee that stung the child could not be traced more probably than not to the hive that was sprayed. The case is distinguishable because while bees are ubiquitous in nature, the slag could only reasonably have come from one source - - the adjacent NSS/IMS premises. While he called them "rocks," Dan Gumola, the union safety representative for the Edison plant at the end of Front Street, said that he had seen trucks

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leaving NSS premises throw objects from their truck tires (Exhibit __U: Gumola dep, pp 19, 26).

Dennis Garber, the regional environmental manager at NSS, could not identify any other sources of metal on Front Street other than from the subject premises (Exhibit BB: Garber dep, p 11). There are no other steel facilities in the area (Exhibit BB: Garber dep, p 11). The only plant farther down Front Street which ends one half mile away at the river is a Detroit Edison plant (Exhibit E: Kuehnlein dep, p 37). The few trucks going there carry coal and the vast majority of trucks on the road are going to and from the NSS/IMS premises.

Garber admitted that he has seen objects as large as six inches in the NSS roadway on the premises, but had taken no affirmative steps to remove them (Exhibit BB: Garber dep, pp 15-16). He admitted seeing objects on Front Street that were as big as three inches (Exhibit BB: Garber dep, pp 24-25). He was not aware of any policy at NSS to require removal of large objects from the traveled roadways. The IMS sweepers are for dust suppression only and would go around any large objects because the object would damage the sweeper's pick-up head (Exhibit E: Kuehnlein dep, p 19).

By contrast, as set forth in Plaintiff's Counterstatement of Facts, Mike Roper, the Works Manager at NSS, insisted that it is important to remove these large pieces of debris from the roadways on the premises because they are a hazard that could cause an accident (Exhibit P: Roper dep pp 15-16). All employees at NSS are responsible for keeping debris off roadways. Both Garber and Suttles should have been aware of this NSS policy (Exhibit P: Roper dep, pp 14-15).

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Judge Kelly's statement that there is no evidence that the object was picked up by Sevigny's wheels before leaving NSS, is simply erroneous because of the gouge marks on the driveway exit apron. These gouge marks began at 42.5 feet inside NSS premises on the driveway itself.

The Court of Appeals majority properly recognized Plaintiff presented sufficient evidence for a jury to decide whether NSS/IMS realized or should have realized the risk that errant chunks of slag on the premises roadways might cause. There is a question of fact as to the conditions of the roads. The legal cause foreseeability element is satisfied and a jury should be permitted to decide whether "but for" and proximate causation is established with respect to the premises Defendants' from the direct and circumstantial evidence presented.

Relief Requested

For the reasons set forth, the Court of Appeals opinion properly reversed the trial court on the issues of Defendants Sevigny, J.R. Phillips Trucking, Ltd, International Mill Service, Inc., and North Star Steel Company. Duty and causation in this tragic case present issues for jury determination by the constitutional factfinder. If, after briefing and oral arguments on the Applications, the Court has any residual doubts about submitting this case to the factfinder as directed by the Court of Appeals, the significance of the issues presented mandate the plenary grant of leave so that the duty and causation issues may be further developed by all parties and by interested amicus individuals or groups.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

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By: Tammy J. Reiss

Arnold J. Matusz (P33203)
Tammy J. Reiss (P41851)
Attorneys for Plaintiff-Appellee
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

Dated: November 21, 2005

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